

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C.

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In the Matter of

Amendment of Part 90 of the )  
Commission's Rules To Provide )  
for the Use of the 220-222 MHz Band )  
by the Private Land Mobile )  
Radio Service )

PR Docket No. 89-552  
RM-8506

Implementation of Sections 3(n) and 332 )  
of the Communications Act )  
Regulatory Treatment of Mobile Services )

GN Docket No. 93-252

Implementation of Section 309(j) of the )  
Communications Act -- Competitive )  
Bidding )

PP Docket No. 93-253

To: The Commission

Comments of  
Rush Network Corp.  
in response to the  
***Fifth Notice of Proposed Rule Making***

Rush Network Corp. currently holds one of the Phase I, 220 MHz, nationwide licenses. As such, Rush has an intense interest in the matters being considered in the above cited *Further Notice of Proposed Rule Making* (FNPRM). The decisions made by the Commission in the FNPRM will directly affect the ability of Rush Network Corp. to be competitive with other Phase I and Phase II licensees in the 220 MHz market.

Rush generally supports the Commission's previous actions and current proposals to add flexibility to the 220 - 222 MHz rules and regulations. Rush appreciates the difficulties in conforming operational rules between pre-auction and post-auction licensees, or said another

way, pre-geographic and post-geographic licensees. The Commission's decisions will, however, have a dramatic effect on the future of commercial radio services in this band. In that regard, Rush offers the following comments to the Commission's proposals.

### **Partitioning and Disaggregation**

The Commission proposed to allow Phase I nationwide licensees to partition their licenses in a manner similar to partitioning allowed for broadband PCS licensees. Rush fully supports this proposal. Additionally, the Commission proposed allowing disaggregation for all Phase I and Phase II licensees. Rush also supports this proposal. Both actions will give licensees the opportunity to put facilities in place in a manner fully consistent with user demands.

### **Available License Area**

The FNPRM suggests that Phase I nationwide licensees and covered Phase II 220 MHz licensees should be permitted to partition licenses as they see fit without being constrained to follow political boundaries. Although this approach may complicate maintenance of the Commission's licensee data base, it is the right answer. As noted in the FNPRM, the Commission has made this decision in other radio services and it is appropriate to extend the decision to the 220 MHz band. Rush can see no technical difficulties or other issues specific to the 220 MHz band that should prevent the flexible partitioning approach. If the commercial mobile radio service (CMRS) licensees in the 220 MHz band are to be fully competitive with CMRS licensees in other bands, then similar rules must apply. In addition, partitioning will give small and very small businesses an opportunity to participate in 220 MHz radio systems and encourage use of the band in areas that might not be economically viable for larger operators.

### **Minimum or Maximum Disaggregation Standards**

Rush applauds the Commission's tentative decision to allow disaggregation of channels. The permitted uses of channels in the band should be as flexible as possible. After all, the real goal in the band should be to achieve maximum use, not require continued aggregation of channels in ways that may cause uneconomic consequences. As an example, one of the best uses of a particular channel might be for some type of single-channel data system owned and

operated by a licensee different from a five channel nationwide licensee. The Commission's rules should not artificially limit disaggregation to such an entity. Additionally, because of the Commission's decision in the *Third Report and Order* not to require a licensee to build out all channels at all sites, disaggregation becomes a necessary corollary.<sup>1</sup> From a spectrum management standpoint, it is far better to allow the channel to be disaggregated and be put to use by someone who needs it, rather than have it remain unconstructed by a licensee who does not need it and cannot disaggregate the license.

### **Combined Partitioning and Disaggregation**

The Commission could not be more correct in its tentative conclusion to allow combinations of partitioning and disaggregation. These options provide the flexibility that will let the band develop in direct response to market forces.

### **Construction Requirements**

Rush fundamentally does not concur with the Commission's construction requirements. Rush believes that the market will cause construction to take place where it is needed and construction should not be required where no demand exists. Licensees have all of the right incentives to maximize use of their channels in the normal course of business decisions. Rush recommends removing all construction requirements and letting Chairman Hundt's stated belief in the marketplace dictate construction and build out.

Absent removal of all construction requirements, Rush requests that the Commission normalize the rules for all 220 MHz nationwide licensees. Most basically, it is unfair to require a Phase I licensee to build all licensed channels at each required location when Phase II nationwide licensees could build only one channel at unspecified locations and meet their construction requirements. This discrepancy could cause the infrastructure for a Phase I licensee to cost at least *five times* that of a Phase II licensee. Presumably, once the build out requirements had been met for one channel, a Phase II licensee could disaggregate the remaining channels and the new

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<sup>1</sup> See, 220 MHz Third Report and Order, FCC Docket PR 89-552, cited above, at paragraph 158.

licensees would have no build out requirements. A Phase I licensee, on the other hand, could disaggregate only with the baggage of construction requirements flowing to any disaggregated channel. Under the present rules, not only are Phase I licensees at an economic disadvantage if they keep their channels because of the five channel construction requirement, they are also at a disadvantage if they attempt to disaggregate the channels.

If the Commission continues to believe that any construction requirement is necessary, then it should at least put Phase I and Phase II licensees on par with each other. Rush can see no reason to retain the two, four, six and ten year benchmarks based on number and location of cities served. In addition to the disparity with Phase II licensees described above, Rush has an additional concern. Equipment for the 220 MHz band continues to be developed very slowly. Only two manufacturers have equipment available and neither of them can provide equipment that fully meets our performance requirements. In addition, neither has produced acceptable portable units. With the benchmark requirement in place, Rush may be forced to construct infrastructure using equipment that cannot perform adequately just to preserve its license. Rush has invested considerable time and money in an attempt to find or to have equipment developed that will meet minimum voice and data requirements, but to no avail. Rush urges the Commission to eliminate the bench mark construction requirements that will force us to build an inadequate infrastructure throughout the country just to preserve the license.

If, however, the Commission desires to retain the multi-year benchmarks for Phase I nationwide licensees, then equity demands a reduction from the five channel requirement to a one channel requirement. We disagree with the Commission's tentative conclusion that the current channel-by-channel construction requirements of Phase I licensees should necessarily flow to a disaggregated license. At least a one channel requirement would put Phase I and Phase II licensees under the same umbrella for construction, partitioning and disaggregation requirements.

The Commission acknowledges at paragraph 339 that, "...the construction requirements for Phase I nationwide licensees differ so markedly from those pertaining to Phase II nationwide

licensees or licensees in other services..." The FNPRM goes on to paint two scenarios that make partitioning and disaggregation problematic for Phase I nationwide licenses. These scenarios vanish by conforming construction requirements.

If the Commission cannot agree to any of the above suggestions, then a Phase I licensee should be allowed to partition or disaggregate, as desired, after the four year benchmark has been met. Under the current rules, after the four year bench mark has been met, the Phase I licensee can retain any constructed stations even if the six and ten year benchmarks are not met. This policy should be extended to allow any partitioned and/or disaggregated licensee to retain their licenses after the original licensee has met the four year bench mark. In addition, any constructed, partitioned and/or disaggregated station should count toward the original licensee's build out benchmarks.

#### **License Term**

Rush certainly concurs with a uniform ten year license term. The decision in the above issue relating to construction, however, directly affects the issue of renewal expectancy of partitioned and/or disaggregated licenses. If a Phase II licensee can build only one channel and then disaggregate four channels that have no construction requirements, as we believe the current rules permit, then most of paragraph 342 becomes moot. Rush recommends that a renewal expectancy should exist for partitioned licenses that have constructed and have operational facilities within the partitioned area. Similarly, disaggregated licenses that have constructed and have operational facilities should have a high renewal expectancy. Without such renewal expectancies, it will be very difficult to entice anyone to accept a partitioned or disaggregated license. Rush concurs with the Commission's proposal to have the disaggregated and/or partitioned license have the same renewal date as that of the parent license.

#### **Competitive Bidding Issues**

Rush agrees with the Commission's tentative decision in paragraph 343 to allow licensees of partitioned or disaggregated licenses, who qualify as small or very small businesses, to pay their pro rata share of the remaining government obligation through installment payments.

This option will assure maximum participation by small and very small businesses. Rush further agrees with use of population and amount of spectrum as appropriate measures of the pro rata shares.

The unjust enrichment rules for small and very small businesses can be made very simple. Rush recommends that if the license is sold within the first three years, any bidding credits would have to be paid in full and the remainder of any installments would come due immediately. If the licensee makes a profit after those payments accrue to the government, so be it. At that point, the government has recovered what it would have had if no bidding credits or installment payments had been allowed. Beyond that, there should be no restrictions on sales price or retention period for a license.

### **Licensing Issues**

The licensing procedures with respect to CMRS partial assignments appear reasonable, given the public notice requirements in the Communications Act. For simplicity, Rush recommends the same procedures be adopted for non-CMRS applications. Rush would offer, however, that the delays and extra workload created by the public notice requirement far exceed the potential benefit. Tens of thousands of non-CMRS licenses (private mobile radio service) are issued annually with no public notice period and, to our knowledge, no problems. In a time of desired improvements in government efficiency and minimized burdens on the industry, the public notice requirement could be eliminated with no detrimental effects.

### **Conclusion**

Rush Network Corp. again takes this opportunity to compliment the Commission on its continuing efforts to streamline procedures and provide flexibility for 220 MHz licensees. Even with the Commission's good efforts, serious discrepancies in 220 MHz licensing policies remain that put Phase I licensees at a competitive disadvantage to Phase II and other CMRS licensees. In particular, the construction requirements should be reviewed and standardized among all 220 MHz licensees. Once that has been accomplished, the Commission should allow partitioning and disaggregation of licenses. In addition, Rush, for one, will come to the auction with a more

aggressive attitude toward acquiring additional spectrum if it is not confronted with a hybrid of licensing policies stemming from the differences between the Phase I and Phase II rules.

The 220 MHz band has been slow to develop for a number of reasons. Minimizing restrictive regulations that prevent licensees from tailoring service offerings to the needs of the customers can help make the band a success story of the future.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "KR Hughes", written over a horizontal line.

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